that the Board could not be sued as a corporate body, is the question as to what property right of the Pennsylvania Railroad Company was at stake in this case, for there is the general rule that equity will not take jurisdiction unless a right of property is involved. If the decisions of the Board are not binding, what property right of the company could be lost by the Board functioning? It may be that the good will of the public would be lost by the publication of a decision adverse to the company. However, the opinion does not refer to this question. A third point of interest in the case is that the court construes the act to restrict the Board to cases brought before it. The Board may not of its own initiative step in and assume the control of every step in the settlement of disputes. Finally, the case is instructive in that it decides that it is constitutional for Congress, under the Commerce Clause, to regulate railroad wages through a permanent Board. This is a new question. The only previous Supreme Court decision on the point is Wilson v. New,[6] where the Adamson Act was upheld as intended to take care of a temporary emergency. If the decision is sustained by the Supreme Court it will establish the landmark of a new departure in our constitutional law.

L. H. McK.

DENIAL OF TRIAL BY JURY IN NEWLY CREATED OFFENSES.—Is the convenience and benefit to the public resulting from a prompt and inexpensive trial and punishment of violations of police power regulations more important than the prejudice to the individual resulting from his being deprived of the safeguard of indictment before having to answer and of trial by jury when held to answer? This question confronted the New Jersey Court of Errors and Appeals, when in a recent case [1] they were called upon to decide the constitutionality [2] of the Prohibition Enforcement Act [3] of New Jersey, which is commonly called the Van Ness Act.

The act [4] was unique in that it made Judges of the Courts of Common Pleas, and, in certain circumstances, the Justices of the Supreme Court, magistrates, and required them to enforce the act in certain proceedings. It made any person violating its provisions a "disorderly person" triable by a magistrate without a jury, and, on conviction, liable to sentence of confinement in the workhouse,

[6] Note 4, *supra.*

[1] State v. Katz *et al.*—unreported—Court of Errors and Appeals, New Jersey, November Term, decided, Feb., 1922.

[2] The Act was declared unconstitutional by a vote of the court on all the judgments under review. It was declared constitutional in respect to the denial of the right to trial by jury, which was one of the grounds of appeal, by a vote of 6 to 5.

[3] Act of March 29th, 1921, chap. 103, N. J. Laws 1921.

[4] State v. Katz, Note 1, *supra.*

penitentiary or common jail, for a period not to exceed six months or to pay a fine not to exceed $500 or both. The majority of the court held that the act did not violate the section of the constitution of New Jersey, which provides that "the right to trial by jury shall remain inviolate" [5] and that "no person shall be held to answer a criminal offense unless on presentment or indictment to a grand jury." [6]

Few statutes with penalties as severe as the maximum of the Van Ness Act and providing for a trial before a magistrate without a jury only have been held constitutional.[7] The safeguarding provisions of the State and Federal constitutions, that trial by jury "shall be as heretofore used" [8] "shall be inviolate" [9] and "shall remain inviolate" [10] have been construed with remarkable uniformity to mean that the right to trial by jury as it existed at the adoption of the constitution was to be preserved and remain unchanged.[11] As some of the petty and minor offenses, such as drunkenness [12] and vagrancy,[13] were triable before a magistrate only at that time, they were to continue to be so triable and all other crimes were to continue to be tried by a jury.[14] Little difficulty is therefore encountered in determining whether a crime known to the common law is triable by a jury or not. A real problem, however, is presented when, as in the principal case,[15] the legislature creates an entirely new offense. How is it to be ascertained whether or not an offender can demand a trial by jury for a new statutory offense?

The question is answered by the Pennsylvania Supreme Court by stating that, "There is nothing to forbid the legislature from creating a new offense and prescribing what mode they please ot ascertaining the guilt of those who are charged with it.[16] A few other courts have adopted this view.[17] The doctrine has been dis-

[5] Const. of New Jersey, Art. I, sec. 7.

[6] Const. of New Jersey, Art. I, sec. 9.

[7] Haney v. Bartow County, 91 Ga. 770, 18 S. E. 28 (1893); McInerney v. Denver, 17 Colo. 302, 29 Pac. 516 (1892); State v. Rogers, 91 N. J. L. 212, 102 Atl. 433 (1917); Ward v. State, 5 Ohio S. & C. Pl. Dec. 230, 5 Ohio N. P. 81.

[8] Const. of Ga., Sec. 5, Art. 4.

[9] Const. of Ohio, Sec. 5, Art. I.

[10] Const. of Ala., Sec. 7, Art. I.

[11] Reynolds v. State, 61 Ind. 392 (1878); Tims v. State, 26 Ala. 165 (1855); Blanchard v. Raines, 20 Fla. 467 (1884); Raymond v. Flovel, 27 Or. 219, 40 Pac. 158 (1895).

[12] Trigally v. Memphis, 6 Coldw. 382 (Tenn. 1869).

[13] State v. Noble, 20 La. Ann. 325 (1868).

[14] Beyers v. Com., 42 Pa. 89 (1862).

[15] State v. Katz, Note I, *supra*.

[16] Swartow v. Com., 24 Pa. 131 (1854); Com. v. Andrews, 211 Pa. 110, 60 Atl. 554 (1905).

[17] Tims v. State, 26 Ala. 165 (1855).

approved by a large number of courts [18] and has been called pernicious and dangerous by text writers.[19] Under our system of government where the judicial branch is empowered to determine the constitutionality of acts of the legislative branch, a rule of this kind would seem to be an anomaly.[20]

"A sounder rule is adopted quite generally, which is to the effect that if an offense is of the *class* of offenses which were triable by a jury at the time of the adoption of the constitution the new offense should be so triable and *vice versa* for an offense which was not of a class triable by a jury at that time a jury trial could not be demanded now.[21] Some courts suggest 'nature'[22] instead of 'class' and others add 'status'[23] and some say crimes 'fit to be tried by jury'[24] should be tried in that manner." The process is thus given different names but there seems to be a tendency by all courts to determine the matter arbitrarily. No tests or standards nor even limitations are suggested which would indicate the reason for placing a particular offense in any certain class. The decisions generally recognize that there are two classes and then conclude that the particular offense under discussion falls in one class or the other. The principal case [25] was decided upon the doctrine that the class to which a case belongs should determine the mode of procedure. The difficulty which confronted the court was a test for determining the class. The minority opinion states: "The touchstone is the Constitution, and that provides that the 'right of trial by jury shall remain inviolate.' Therefore, if the punishment denounced is greater than that which could have been imposed upon conviction by a magistrate without a jury at the time of the adoption of the Constitution, it can be imposed now only upon the verdict of a jury, because it could not then have been imposed without it; and it falls perforce into the class of cases triable by Jury." Thus the amount of punishment is the standard for determining the class.

The majority opinion, however, states "the real underlying historically established test depends upon the character of the offense involved rather than upon the penalty imposed. The offense must be a petty and trivial violation of regulations established under the police

[18] *Ex parte* Wong You Ting, 106 Cal. 296, 39 Pac. 627 (1895); McInerney v. Denver, Note 7 *supra*; People v. Kennedy, 2 Park Cr. 312 (N. Y. 1855).

[19] Proffatt, Jury Trial, Sec. 98.

[20] Marbury v. Madison, 1 Cranch 137 (1803).

[21] Wynehamer v. People, 13 N. Y. 378 (1856); Fire Department v. Harrison, 2 Hilt. 455 (1859); Wood v. Brooklyn, 14 Barb. 425 (N. Y. 1852).

[22] Fire Department v. Harrison, Note 21, *supra.*

[23] McInerney v. Denver, Note 7, *supra.*

[24] Plimpton v. Somerset, 33 Vt. 283 (1860).

[25] State v. Katz, Note 1, *supra.*

power of the State in order that the offender may be summarily tried, convicted, and punished without indictment by a grand jury and without trial by a petit jury."

The idea embodied in the statement of the majority seems correct but little information is given for future guidance and the opinion itself proceeds to the conclusion that the offense is a trivial offense to which exceptions might well be taken. The class of crimes which were triable before magistrates without a jury before the adoption of the constitution as stated above were such crimes as drunkenness, disorderly conduct and vagrancy. They were offenses petty and trivial in the true sense of the words, consisting mainly in violations of regulations for the suppression of undesirable occurrences. There was nothing particularly harmful in the violations and a large number of such violations was to be expected. Frequent violations by the same individual were also to be expected so that a convenient and inexpensive mode of procedure was necessary. When a citizen may be punished by being imprisoned for a period of six months and fined $500, it does seem that the offense which carries such punishment ceases to be of a trivial and petty nature and impossible of being included in such a class. The majority opinion refused to consider penalty in determining the class of the offense and no doubt rejected an important element. The opinion suggested that if punishment too severe for a trivial and petty offense should ever be adopted it would violate the section of the constitution forbidding cruel and unusual punishments. But punishments might well be incommensurate and too severe and yet not be cruel and unusual. Surely, the penalty should be an element of consideration in determining the class of the offense. The Massachusetts courts hold a penalty of imprisonment in a state prison makes a crime infamous under the constitution of that state and thus gives the offender the right to trial by jury.[26] The federal courts have adopted a similar rule.[27] The punishment, however, cannot serve as the sole test, as the punishment for attempts to commit some crimes is the same as for the commission of the crimes themselves.[28]

A workable rule might well be established for determining the class of the offense which gives consideration to the punishment provided by the statute, the moral turpitude involved and the regard of the public for the offender's criminality and immorality. It is submitted such a rule will neither prejudice the rights of the individual nor burden the state with excessive procedure in the enforcement of its police regulations.

F. F. T.

[26] Jones v. Robins, 8 Gray 329 (Mass. 1857).
[27] Callan v. Wilson, 127 U. S. 540 (1887).
[28] Act 1860, March 31, Sec. 137, P. L. 382 (Pa.).